Supreme Court, U.S.
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No. 87-1826

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DOUGLAS WAYNE SMITH,

Petitioner,

vs.

JOHN C. O'MALLEY, Administrator of the Illinois Attorney Registration and Disciplinary Commission,

Respondent.

On Petition For A Writ Of Certiorari To The United States Supreme Court From The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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Sheila M. Tuma, Senior law student, assisted in the preparation of this brief.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT FROM
THE SUPREME COURT OF ILLINOIS
ILLINOIS SUPREME COURT NO. M.R. 4580
ADMINISTRATOR'S NO. 87 CH 303

RESPONDENT'S BRIEF IN OPPOSITION

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION INVOLVED

SUPREME COURT RULE 752. Administrator

...Subject to the supervision of the Commission, the Administrator shall:

(a) On his own motion, on the recommendation of an Inquiry Board or at the instance of an aggrieved party, investigate conduct of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute...

SUPREME COURT RULE 754.
Compulsory Process

The Administrator, the Inquiry Board and the Hearing Board are empowered to take and transcribe the evidence of respondents, petitioners and any other attorney or person who may have knowledge of the pertinent facts concerning any matter which is the subject of an investigation or hearing. Upon request of the Administrator, the respondent, the petitioner or the inquiry or hearing boards, the clerk of the Court shall issue subpoenas ad testificandum or subpoenas duces tecum. The Administrator, the respondent or the inquiry or hearing boards may report to the court the failure or refusal of a respondent, petitioner, attorney or any other person to attend and testify in response to any subpoena or to produce the items specified in the subpoena duces tecum.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, a denial of a motion to quash subpoena is not a final judgment or decree within the meaning of 28 U.S.C. §1257(3) (1970). In addition, there has been no final ruling in this proceeding by the Supreme Court of Illinois. Without such a ruling, there is no final judgment from which this court may take jurisdiction.

Second, the Petitioner has raised no significant federal question. The disciplinary proceedings pending against Petitioner only involve questions of state law. Petitioner has asserted a violation of the Fourth Amendment only to delay the disciplinary proceedings.

Third, the denial of the motion to quash the subpoena by the Supreme Court of Illinois is in accord with the decisions of the United States Supreme Court. Subpoenas issued by investigatory bodies will be upheld as long as the information sought is reasonable in scope, relevant to the inquiry and definite in nature. The subpoena duces tecum at issue complies with the criteria outlined by this Court. Thus, the Supreme Court of Illinois properly denied Petitioner's motion to quash the subpoena duces tecum.

ARGUMENT

I. BACKGROUND

The Supreme Court of Illinois has inherent authority to regulate the practice of law. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), In re

Teitelbaum, 13 Ill.2d 586, 150 N.E.2d 873, cert. denied 358 U.S. 881, rehearing denied, 358 U.S. 923 (1958). Pursuant to that authority, the court has delegated certain functions to the Attorney Registration and Disciplinary Commission to assist it in regulating the practice. Ill.Rev.Stat. ch. 110A §751-754.

Petitioner, an Illinois attorney, represents numerous clients in dissolution of marriage proceedings. Since 1980, as a result of charges of misconduct submitted by Petitioner's clients, over 100 investigations have been initiated. The charges of misconduct relate generally to allegations of mishandling funds advanced to Petitioner by his clients, deceptive advertising and neglect of client matters. In furtherance of the investigations, a subpoena duces tecum

was served upon Petitioner compelling the production of certain material. A copy of this subpoena is set forth in Appendix One. The scope of the subpoena duces tecum was limited twice due to Petitioner's concerns that compliance with the subpoena would be too burdensome. A copy of the letters dated May 4, 1987 and April 27, 1988 limiting the scope of the subpoena are set forth in Appendix Two and Three respectively.

The Administrator's investigation into Petitioner's alleged misconduct is ongoing. Petitioner seeks only to halt the orderly progress of the investigatory proceedings through his petition. Review by the Supreme Court at this time would delay the investigation and frustrate the effectiveness of the attorney disciplinary system.

II. PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. §1257(3)

This Court has jurisdiction to review state court action only after the highest court of the state has rendered a final judgment or decree. 28 U.S.C. §1257. A judgment is not final unless a writ of error terminates the litigation between the parties on the merits of the case. Following a final judgment nothing remains to be done but the entry of the judgment by the inferior court. See, Mower v. Fletcher, 114 U.S. 127 (1885).

An order denying a motion to quash a subpoena duces tecum is not a final appealable decision. See, e.q. Cobbledick v. United States, 309 U.S. 332 (1940). A litigant will not be allowed to appeal a ruling where the result of the review would only be to halt the orderly progress of a cause. See, e.g.,

Segurola v. United States, 275 U.S. 106, 112 (1927).

While this court has recognized certain exceptions to the final judgment rule, this matter does not fall within those exceptions. In Cox Broadcasting v. Cohn, 420 U.S. 469 (1975), this Court recognized four categories of cases in which federal jurisdiction exists even though there is no final judgment under Title 28 or the United States Code, subsection 1257.

The first category includes those matters in which there are further proceedings pending in the state court, but the federal issue is conclusive and the outcome of the proceeding is preordained. Because such a case is for all practical purposes concluded, the judgment of the state court related to the federal issue is deemed final. Id.

at 479. This exception does not apply to the present case. The Administrator has not had a sufficient opportunity to review the information sought in the subpoena duces tecum. Until the material is made available to the Commission, it cannot be conclusively determined whether there has been professional misconduct by the Petitioner. Since the information and documents have not been subject to inspection, production of the materials will not preordain the outcome of the proceeding.

The second category of cases are those in which the federal issue requires a decision regardless of the outcome of anticipated state court proceedings. That is, nothing could occur in the state court proceeding which would foreclose a decision on the federal issue. Id., at 480. This exception does not apply to the present case. In the event that the

investigations related to Petitioner are dismissed the alleged constitutional issue would not need to be addressed.

The third category of cases are those from which later review of the federal issue will not be available because of mootness or res judicata. Id, at 481. This exception does not apply to the present case. The Petitioner may properly raise and preserve constitutional claims at any time during disciplinary proceedings.

In the final category are cases in which a decision on the federal issue would preclude further litigation in the underlying cause of action rather than merely controlling the nature, character and admissibility of evidence in the state court proceeding. Id., at 482-483. This exception does not apply to the present case. Whether or not the

information sought in the subpoena duces tecum is produced, the Administrator is not precluded from investigating or prosecuting Petitioner for various acts of alleged professional misconduct.

III. PETITIONER HAS RAISED NO SUBSTANTIAL FEDERAL QUESTION

Mere allegations that a federal question exists will not confer federal jurisdiction. Rather, there must be a real substantive federal question on which the case turns in order to invoke the jurisdiction of this Court. See, Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902). A petition for Writ of Certiorari must be dismissed if it appears that the federal question is so devoid of merit as to be frivolous, or has been foreclosed by a decision of this court. Id.

This Court has long recognized the

authority of the state to regulate its professions. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Lawyers have historically been considered officers of the court, subject to the Court's inherent authority. See, e.g. In re Primis, 436 U.S. 412, 422 (1978); In re Teitelbaum, 13 Ill.2d 586, 150 N.E.2d 873, cert. denied, 358 U.S. 881, rehearing denied, 358 U.S. 923 (1958).

The investigations related to Petitioner are limited to determining whether he violated the Illinois Code of Professional Responsibility governing the conduct of attorneys. Ill. Ann. Stat. ch 110A, §774, Art. 8, Cannon 1 et seq. (Smith-Hurd 1985). As such, the only question involved is that of state law. No federal statute or provision is ripe for review.

While Petitioner attempts to invoke federal jurisdiction by claiming a

violation of the Fourth Amendment his claim is specious and has been raised merely to delay the disciplinary proceedings. Petitioner has not raised any genuine federal question, as indeed none exists.

IV. PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAVE NOT BEEN VIOLATED

Assuming arguendo that federal jurisdiction does exist, it is clear that Petitioner's Fourth Amendment rights have not been violated. The Fourth Amendment's protection against unlawful search and seizure is satisfied when a subpoena is issued by a body which has authority to investigate for a lawfully recognized purpose. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, (1946). The documents sought must be definite and relevant to the inquiry.

Id., at 208-209. The disclosure of materials sought may not be unreasonable. Id., at 209. Reasonableness, however, cannot be reduced to a formula. What is relevant or excessive in breadth is variable in relation to the nature, purposes and scope of the inquiry. Id.

Contrary to Petitioner's argument that production of the material is so burdensome as to be violative of his Fourth Amendment right, Petitioner is only required to produce records for the years 1985 and 1986 related to the following: ledgers, diaries and appointment books related to Petitioner's office docketing system; documents related to advertisements or solicitations placed or disseminated by Petitioner; documents, files and records related to two-day divorces in which Petitioner accepted responsibility; and financial records related to Petitioner's

acceptance and handling of funds advanced by his clients. See Appendix Two and Three. The Supreme Court of Illinois correctly considered and rejected the same arguments Petitioner raises here and ordered Petitioner to produce the documents for inspection and copying.

When the criteria set forth in Oklahoma Press is applied to the present matter, it is clear that petitioner's rights have not been violated. The documents sought by the subpoena are relevant and relate specifically to the various charges of misconduct. The materials to be produced are not excessive but are necessary to determine whether Petitioner's practice was consistent with the representations made in his advertisements; whether Petitioner's handling of funds advanced by his clients was proper; and whether Petitioner was adequately serving the

needs of his clients.

Similarily, in Consolidated Rending Co. v. Vermont, 207 U.S. 541, 28 S. Ct. 178, 52 L.Ed. 327, (1908), the Plaintiff argued, in pertinent part, that production of the material called for in the subpoena duces tecum would be burdensome and beyond the authority conferred upon the governmental body seeking production. However, the Court held that there was no reason why all books, papers and correspondence which relate to the subject of inquiry and which were described with reasonable detail should not be produced by the Plaintiff.

Petitioner's reliance on People v. Reynolds, 350 Ill 11, 182 N.E. 754, (1932) is misplaced. In Reynolds, the court held the subpoena duces tecum lacked the required particularity in description of the books, records and

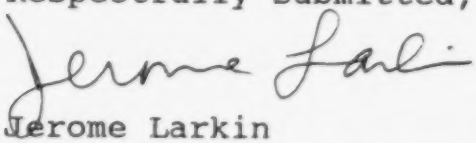
writings demanded. Unlike Reynolds, the subpoena duces tecum at issue specifies and limits the production to books, correspondence and records which are necessary to conduct a proper investigation.

Petitioner's reliance on People v. Keefe, 36 Ill.2d 460, 223 N.E.2d 144 (1967) is also misplaced. In Keefe, the court held the subpoena failed to give a time period and contained language which was susceptible to numerous interpretations. The subpoena in the present case, however, covers a specific time period and does not contain any language that can be misconstrued.

CONCLUSION

For the reasons set forth above, Respondents respectfully submit the Petition for Writ of Certiorari be denied.

Respectfully submitted,



Jerome Larkin

APPENDIX ONE

No. 86-CI-6276

ATTORNEY DISCIPLINARY SYSTEM
OF THE
SUPREME COURT OF ILLINOIS

In the Matter of Douglas Smith

SUBPOENA

STATE OF ILLINOIS
SUPREME COURT—SS.

THE PEOPLE OF THE STATE OF ILLINOIS
Administrator's No. 86-CI-6276

TO Douglas Smith
3407 North Pulaski
Chicago, IL

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before the Administrator of the Attorney Disciplinary System on January 5, 1987 at 4:00 o'clock P.M. at 203 N. Wabash—Suite 1900 in the City of Chicago, County of Cook, to testify and give evidence and the truth to speak in a certain investigation now being conducted by said Administrator relating to Attorney Douglas Smith.

And that you also diligently and carefully search for, examine and inquire after and bring with you and produce at the time and place aforesaid

See Attached

together with all copies, drafts and vouchers relating to the said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said investigation. And this you shall in no wise omit under penalty of the law.

Witness, JULEANN HORNYAK,
Clerk of our said Court, and the
Seal thereof at Springfield, Illinois,
this 5th day of December, 1986

/s/ JULEANN HORNYAK, Clerk.

SUBPOENA ATTACHMENT

1. Any and all ledgers, diaries, appointment books and records related to your office docketing system for the period 1981 to present, including but not limited to, any and all records which identify matters in which you accepted responsibility for the period 1981 to present;

2. Any and all documents related to advertisements or solicitations placed or disseminated by you for the period 1981 to present, including but not limited to, copies of these advertisements and documents reflecting your being billed for these advertisements and your related payments;

3. Any and all notes, memoranda, documents, records, correspondence and files related to divorces in which

you accepted responsibility and completed within two days, for the period 1981 to present, including but not limited to, divorces in which you accepted responsibility and completed for $80.00 for the period 1981 to present; and

4. Any and all ledgers, documents, records and tax returns related to your acceptance and holding of funds which represent legal fees and costs advanced for the period 1981 to present, including but not limited to the account number, account title and name of bank in which you maintained any and all client trust accounts for the period 1981 to present.

PROOF OF SERVICE

Paul Morelli, states under oath that he served this subpoena and letter personally by delivering a copy of this subpoena and letter to Douglas W. Smith on December 19, 1986 at 3407 North Pulaski Road, Chicago, Illinois at or before 6:30 p.m.

/s/ PAUL MORELLI

[Notarization omitted in printing.]

APPENDIX TWO

(Letterhead Of)

ATTORNEY REGISTRATION AND
DISCIPLINARY COMMISSION
of the
SUPREME COURT OF ILLINOIS

Arthur M. Scheller, Jr.
Attorney at Law
300 Meacham Avenue
Park Ridge, Illinois 60068

Chicago
May 4, 1987

Re: Douglas Wayne Smith
at the charge of
the Administrator
No. 86-CI-6276

Dear Mr. Scheller:

I have reviewed the above-captioned matter, including the substance of our conversation on April 28, 1987.

Please be advised that the return date for the subpoena decus tecum served on Douglas Wayne Smith on December 19, 1986 has been continued to May 20, 1987 at 1:00 p.m. Therefore, Mr. Smith is expected to comply with the subpoena on May 20, 1987 at 1:00 p.m. In the event that Mr. Smith does not comply with the subpoena on May 20, 1987, we will report his non-compliance to the Illinois Supreme Court pursuant to Rule 754.

At this time, in light of your objection to the subpoena duces tecum, we are narrowing the scope of the subpoena to the years 1985 and 1986. Therefore, in order to comply with the subpoena duces tecum, Mr. Smith must appear on May 20, 1987 to give testimony and to produce the following items:

1. Any and all ledgers, diaries, appointment books and records related to Mr. Smith's office docketing system for the years 1985 and 1986, including but not limited to, any and all records which identify matters in which Mr. Smith accepted responsibility for the years 1985 and 1986;

2. Any and all documents related to advertisements or solicitations placed or disseminated by Mr. Smith for the years 1985 and 1986, including but not limited to, copies of these advertisements and documents reflecting Mr. Smith's being billed for these advertisements and Mr. Smith's related payments;

3. Any and all notes, memoranda, documents, records, correspondence and files related to divorces in which Mr. Smith accepted responsibility and completed within two days, for the years 1985 and 1986, including but not limited to, divorces in which Mr. Smith accepted responsibility and completed for $80.00 for the years 1985 and 1986; and

4. Any and all ledgers, documents, records and tax returns related to Mr. Smith's acceptance and holding of funds which represent legal fees and costs advanced for the years 1985 and 1986, including but not limited to the account number, account title and name of bank in which Mr. Smith maintained any and all client trust accounts for the years 1985 and 1986.

The subpoena duces tecum requires Mr. Smith's production of tax returns for the years 1985 and 1986 in order to determine how Mr. Smith characterizes funds he has received from others and disbursements made.

Thank you for your cooperation.

Very truly yours,

/s/ SUSAN D. SHIVERS
Counsel

APPENDIX THREE

(Letterhead Of)

ATTORNEY REGISTRATION AND
DISCIPLINARY COMMISSION
of the
SUPREME COURT OF ILLINOIS

Mr. Douglas W. Smith
Attorney at Law
3407 North Pulaski Road
Chicago, IL 60641

Chicago
April 27, 1988

Re: In re Douglas Smith

Supreme Court No. M.R. 4580
Administrator's Nos. 87 CH 303
86-CI-6276

Dear Mr. Smith:

On April 12, 1988, you appeared at this office pursuant to the subpoena duces tecum. During the proceedings on that date, we discussed the matters related to the above-captioned proceedings. As I advised you, the Administrator will consider the subpoena duces tecum served upon you in connection with Investigation no. 86-CI-6276 complied with if the following records are produced within 21 days:

a. any and all notes, memoranda, documents, records, correspondence and files related to two-day divorces

in which you accepted responsibility from 1985 to present;

b. any and all records related to your acceptance and holding of funds which represent legal fees and costs advanced for the years 1985 and 1986, including but not limited to receipt journals, check ledgers, tax returns and documents identifying the account number, account title and name of the financial institution in which you maintained client trust accounts for the years 1985 and 1986; and

c. any and all documents related to advertisements or solicitations placed or disseminated by you for the years 1985 and 1986, including but not limited to copies of the advertisements and documents reflecting billing for these advertisements and the related payments.

If you have any questions please contact me immediately. Thank you for your cooperation.

Very truly yours,

/s/ DEBORAH M. KENNEDY
Senior Counsel